

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF OF AMICUS CURIAE

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 19,072

618

MELVIN B. BISHOP, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 12 1965

Nathan J. Paulson
CLERK

**SHELDON E. BERNSTEIN
AMICUS CURIAE**

QUESTIONS PRESENTED

Appellant was sentenced below on his plea of guilty entered on the advice of counsel of his own choice who, appellant now claims, was unprepared and misled him as to alleged arrangements with respect to probation. Appellant further claims he was denied a fair hearing below on his motion to vacate sentence and permit withdrawal of his guilty plea, although in his brief here, he confirms his guilt of the offense charged, but implies the existence of mitigating circumstances.

In this context, it is the opinion of your ^{1/}amicus that the questions presented are:

1) Whether there is any possible basis for a claim of "manifest injustice" under Rule 32(d), F.R. Crim. P. in the light of appellant's confirmation of his guilt.

^{1/} Since the Court did not, as in Williams v. Georgia, 349 U.S. 375 (1955), see order at 348 U.S. 957, qualify its appointment to indicate that this amicus curiae was to present argument in support of appellant, it has been assumed that the appointment is intended to evoke expressions of the public interest in the administration of justice without regard to which of the parties those expressions may favor. See Universal Oil Products v. Root Refining Co., 328 U.S. 575 (1946).

2) Whether for the same reason, questions as to circumstances preceding and incident to his guilty plea and bearing upon the fairness of the hearing below on his 32(d) motion now present questions affecting "substantial rights".

3) Whether question as to a guilty plea being voluntarily and understandingly made could be avoided by adequate contemporaneous inquiry by the trial court, and whether the need therefor requires exercise of this Court's supervisory jurisdiction.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,078

MELVIN B. BISHOP, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF OF AMICUS CURIAE

STATEMENT OF THE CASE

A. PROCEEDINGS THROUGH SENTENCE

To an indictment filed November 18, 1963, charging him with assault with a dangerous weapon, appellant, Melvin B. Bishop, an apparently educated man, ^{2/}pleaded not guilty on November 22, 1964, and thereafter, on February 26, 1964, withdrew his earlier plea and pleaded guilty. On the occasion of both pleas, he was represented by counsel of his own choice. The relevant colloquy at the time appellant pleaded guilty is set out in Appendix "A" to this brief.

^{2/} Apparently a mathematician at a defense installation, his intelligence was emphasized in the opinion below to deride Bishop's motion (Tr. 40).

Thereafter, on April 7, 1964, following the apparently usual probation office pre-sentence investigation, during the course of which the trial judge apparently received a personal letter from the complaining witnesses' mother (Transcript of Sentencing, April 7, 1964, p. 3), appellant, still represented by the same counsel of his choice, was sentenced to a term of from two years and four months to seven years imprisonment under a statute (22.D.C. §502 (1961 ed.)) authorizing a sentence of up to ten years imprisonment. Relevant portions of the colloquy at time of sentence are set out in Appendix "B" to this brief.

B. POST SENTENCE PROCEEDINGS

On April 16, 1964, through his same counsel, appellant filed a Notice of Appeal. Thereafter, on May 22, 1964 (approximately one and one-half months after sentence), during the pendency of a motion to dismiss the appeal, appellant filed, pro se, in this Court, a document entitled Motion for Leave to Petition for a Writ of Error Coram Nobis in the United States District Court. As a result, on June 11, 1964, this Court

3/

entered an order, set out in the margin, by which the motion to dismiss the appeal was held in abeyance, this Court retained jurisdiction and the record was remanded to the District Court "for such action on appellant's aforesaid motion as that court may be advised to take." On June 29, 1964, appellant filed his Petition For a Writ of Error Coram Nobis in the District Court.^{4/}

3/ "This case came on for hearing on appellee's motion to dismiss appeal, and said motion was argued by counsel. Upon consideration whereof, and counsel for appellant having informed the court during oral argument that he has been informed that appellant has submitted a motion to the court in which appellant now contends that his plea of guilty was not voluntarily entered in the District Court, and it appearing that appellant has submitted to this court a paper which he entitled "Motion for leave to petition for a writ of error coram nobis in the United States District Court Rule 31, 28 USC 1651," and it further appearing that the allegations contained in said paper should be presented to the District Court, it is

ORDERED by the court that the aforesaid motion to dismiss be held in abeyance, and the record in this case is hereby remanded to the District Court for such action on appellant's aforesaid motion as that court may be advised to take. See Smith v. Pollin, 90 U.S. App. D.C. 178.

This court retains jurisdiction in this case and the Clerk of this court is hereby directed to transmit the record and appellant's motion to the District Court forthwith."

4/ He also filed other motions (Motion for Bail, Rule 46(a) and Motion to Calendar for the Granting of Bail, Constitution Amended 8) not relevant to this appeal.

New counsel of appellant's choice entered his appearance in the court below on October 9, 1964, and on October 23, 1964, the court below took testimony and heard appellant's motion, construed as a motion under Rule 32(d) to set aside the conviction and for leave to withdraw a plea of guilty after sentence. The full transcript (38 pages) of that proceeding is contained in the record. At the conclusion of the hearing, the trial judge rendered an extensive oral opinion denying the motion. This appeal followed.

In summary, the testimony below was as follows:

1. Appellant testified that his counsel had given him and the case little time or attention; that on February 6, 1964, when he entered his plea of guilty, he was given little or no advance notice or opportunity to reflect, and that he entered the plea of guilty only because of the express assurance of his counsel that counsel had made arrangements with the prosecutor so that the case would come up before a particular judge and appellant would get probation if he pleaded guilty (Tr. 12-20, 36-37) .

2. The prosecutor testified that he had conferred with defense counsel but that the exchanges were limited to a description of the evidence available to the Government; that he had no prior knowledge that appellant intended to plead guilty, and;

that he had not discussed or made any arrangements with counsel for appellant to receive probation nor to have the matter set before any particular judge (Tr. 21-24).

3. Finally, defense counsel testified that he had made no such representations nor given such assurances as his former client claimed; that he had told him that if he went to trial he would undoubtedly receive the maximum sentence because there appeared to be no mitigating circumstances, but that if he pleaded guilty, he would undoubtedly receive a lesser sentence although counsel had no control over who would hear the case or whether appellant would get probation, but; that he had related to appellant a similar case some years earlier in which the defendant had received probation (Tr. 25-36).

In its opinion, the court below found that appellant's allegations as to representations made to him by his counsel were "pure fabrication" (Tr. 42).

RULES INVOLVED

Rule 11, Federal Rules of Criminal Procedure, provides:

"A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 32(d), Federal Rules of Criminal Procedure, provides:

"Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

SUMMARY OF ARGUMENT

I

Under this Court's decision in Everett v. United States, ____ U.S. App. D.C. ____, 336 F.2d 979 (1964), the mere desire to have a jury trial is not such a "fair and just" reason as to warrant a motion to withdraw a plea of guilty before sentence. The dissent's conclusion that this destroys the "dispensing function" of the jury to acquit, if it is so inclined, notwithstanding technical guilt, fails to appreciate that this "dispensing function" is an unavoidable by-product

not a design of history. On balance, to protect the integrity of the jury function and thus democratic ascendancy over executive or judicial tyranny, we historically accepted the concomitant risk that sometimes a jury might depart from fact and law and acquit.

The reasoning of Everett is even more applicable to a 32(d), F.R.Crim. P., motion made after sentence where, as here, there is a continuing admission of guilt. Under the decided cases, "manifest injustice" cannot be found here. Moreover, a contrary conclusion would make a game of the judicial process, for a defendant could then plead guilty in the hope of a clement sentence, and then, if disappointed, have that sentence vacated and start all over before a jury in the hope that mischance might bring acquittal.

Nor is the situation altered by appellant's allegations that he was not given the effective assistance of counsel up to and through the time he pleaded guilty. Even if true, those allegations have in effect been rendered moot by the continuing uninfluenced admission of guilt.

II

While the record makes it evident appellant was denied a fair hearing below on his 32(d) motion, nevertheless,

in the circumstances of this case, and particularly the continuing uninfluenced admission of guilt, even a fair hearing could not find a basis to warrant the conclusion that manifest injustice would result were the motion not granted.

III

The situation posed on this appeal could be avoided in most instances were the trial courts required to make full and proper inquiry at the time of accepting a guilty plea to ascertain whether the plea was freely and voluntarily made without reliance upon any promises or assurances as to the consequences of conviction or the sentence that might be imposed. Accordingly, this Court's supervisory jurisdiction might be exercised to compel adherence to this practice which the court below attempted to initiate in its resolution .. promulgated June 24, 1959.

8.

ARGUMENT

INTRODUCTORY

Appellant, pro se, asserts and argues here that his guilty plea was not voluntarily and understandingly made in that his counsel was unprepared and that his plea was induced by his counsel's misrepresentations with respect to arrangements said to have been made with the prosecutor as to sentence. He further claims he was denied a fair hearing below on his 32(d) motion.

In opposition, the Government argues that the circumstances show his plea was understandingly and voluntarily entered; that mere disappointment of an expectation of great leniency does not vitiate a plea; that appellant was given adequate opportunity to establish his claims in the 32(d) hearing; and that there has not been a sufficient showing here to establish abuse of the discretion given the trial court under 32(d).

There may be reason in the record, as will be discussed hereinafter, to question: 1) whether appellant was given a fair hearing on his 32(d) motion, and; 2) whether such a fair 32(d) hearing required fuller exploration of the circumstances under which appellant's guilty plea was entered, including allegations

that the plea was improperly induced by misrepresentations of counsel, or improvidently brought about by the inadequacies or lack of attention of counsel.

However, it would appear that the critical questions before this Court, in view of appellant's pro se affirmation in this Court of his guilt of the offense charged, and his failure to claim innocence, are: 1) Whether a showing of manifest injustice, within the meaning of Rule 32(d), F.R. Crim.P., could ever be established; 2) whether, even assuming arguendo appellant's allegations as to the circumstances leading up to his plea of guilty are accepted at their face value, such circumstances would be foundation for a claim and showing of manifest injustice within the meaning of the rule; and, 3) whether, therefore, even assuming that appellant was not given a fair hearing on his 32(d) motion, his substantial rights have been affected.

Finally, in view of appellant's allegations as to the circumstances surrounding his guilty plea, question arises whether this Court, in the exercise of its supervisory jurisdiction, should require the court below to make more adequate inquiry at the time of accepting a guilty plea so as to assure that the plea is made voluntarily and understandingly and thereby avoid the very type of issue raised in the 32(d) motion.

I.

CAN THE 32(d) REQUIREMENT THAT DISCRETION BE EXERCISED "TO CORRECT MANIFEST INJUSTICE" EVER BE SATISFIED IN THE FACE OF CONTINUING ADMISSIONS OF GUILT EVEN ASSUMING THERE IS SERIOUS QUESTION WHETHER DEFENDANT WAS MISLED BY HIS OWN COUNSEL INTO PLEADING GUILTY?

A. What Appellant Has Said About His Guilt and Mitigating Circumstances

When he entered his plea of guilty, Bishop said "Yes" in response to the trial court's question "Now the charge against you is that you assaulted Marsha L. Cox with a caustic acid. Did you do this?" (See Appendix "A") We have no record of what he actually said to the Probation Officer thereafter, except the statement in the opinion below that:

"As is usual, the defendant was interviewed by the Probation Officer between the date of the plea and the imposition of sentence. That interval was two months; February 26th, 1964 was the date of sentence. Nothing was said by the defendant, according to the Probation Officer's report, that he expected a probation sentence."

In neither his Motion for Leave to Petition for a Writ of Error Coram Nobis nor his Petition for a Writ of Error Coram Nobis do we find any representations by the

appellant with respect to innocence, guilt or mitigating
5/
circumstances.

In his 32(d) testimony below, without explaining or qualifying or protesting his innocence, appellant admitted that he had entered the guilty plea, and that at that time he was asked a series of questions by the court; he testified that apart from counsel's representation to him he had expected probation anyway and he made no response to the court's remarks that a person who did what he had done could not expect probation (Tr. 12-20).

In his pro se brief here, appellant makes a series of statements admitting he did the acts with which he was charged in the indictment, but indicating he did not intend to seriously hurt the complaining witness (Br. pp. 2, 3, 6, 7). However, he implies, without supporting detail, that there may have been some justification for what he did and that a priest

5/ On pages 7-8 of the Petition he stated: "Petitioner acknowledges that he indicated to the trial judge that the plea was entered voluntarily and that he understood the nature of the proceedings that was then taking place, whereas in its legal sense Petitioner did not understand the nature of the charge and proceedings or its seriousness which he had consented to submit on the fraudulent advice of his Attorney. Petitioner consented to the arrangements thinking that an agreement had been worked out with the Prosecuting Attorney and Judge Holtzoff.

with whom he had discussed the matter had said that "no jury would send you to jail if they knew the circumstances" (Br. p. 4). Nowhere in his brief does he make any claim or pretense of innocence of the crime charged.^{6/}

In summary:

1. At no time since entering his plea of guilty on February 26, 1964, has appellant ever, in any of the several documents filed in this Court and the court below, or in his vive voce statements and testimony at the time of sentence and at the time of the 32(d) hearing, asserted his innocence or denied his guilt.

2. In the 32(d) hearing below, faced with questions about his plea of guilty and assertions by the court that no one who had done what he had done could have possibly expected probation, appellant made no protestations of innocence or in

6/ In his brief appellant apparently disclaims any defense of insanity (pp. 5, 6) and there is an untested letter opinion dated January 31, 1964 in the Record from David H. Dabney, M.D., to appellant's former defense counsel, which letter concludes Bishop to be without mental disorder. However 27 years of trial and general practice have not equipped this amicus to understand the explicit and implicit attitudes with respect to guilt and mitigation evidenced in appellant's pro se brief. Those attitudes may suggest mental disease not heretofore tendered as a ground of defense. If so, however, the problem could be raised or considered by the appropriate authority under 18 U.S.C. §4241 et seq. or 28 U.S.C. §2255 without necessarily being considered on this appeal.

any way qualified or explained his prior guilty plea, other than to assert it was the result of the inadequacies of and misrepresentations by his counsel; and

3. In his extended pro se brief here, he not only does not protest his innocence and deny his guilt but, on the contrary, expressly states that he did the acts with which he was charged in the indictment, but then infers, without spelling them out, circumstances by reason of which he hopes a jury would not convict him.

B. In the Context of Appellant's Position
Vis a Vis Innocence and Guilt, Would
There be any Basis for a 32(d) Motion
After Sentence "To Correct Manifest
Injustice?"

1. Existing Law With Respect to a
Pre-Sentence Motion Made Under
Such Circumstances

The most exhaustive recent treatment of this point is that of this Court in Everett v. United States, ____ U.S. App. D.C. ____, 336 F.2d 979 (1964), where, after adverting to the court's earlier decisions in Poole v. United States, 102 U.S. App. D.C. 71, 75, 250 F.2d 396, 400 (1957) that leave "should be freely allowed" when a defendant seeks to withdraw his plea of guilty before sentence and in Gearhart v. United States, 106 U.S. App. D.C. 270, 273, 272 F.2d 499, 502 (1959) that such

leave should be granted "if for any reason the granting of the privilege seems fair and just," the majority held that absent other contra indicating circumstances a continuing admission of guilt required denial of a 32(d) motion. The strong dissent of Judge Wright found sufficient reason was assigned where defendant claimed he stole to provide money for medical care for his pregnant wife. In Judge Wright's view that fact, if true, could be considered by a jury in passing on the culpability of the accused, it being within the jury's "dispensing function" to acquit, even though a defendant was proven to be guilty of the crime charged, where the jury believed there were mitigating circumstances or, notwithstanding the law, the jury, as a cross-section of the community, was of the view that there was no personal culpability.

Because of the cogency of Everett to the problem here, it is important to examine into the pros and cons of that decision. In support of the majority in Everett, it can be argued;

(1) Case law consistently denies relief in such circumstances.

(2) There is nothing unfair about refusing to grant relief from his plea to a man who still admits his guilt; the

existence of alleged mitigating circumstances is a matter for the sentencing authority.

(3) The minority view would create difficult, if not impossible, collateral problems seemingly long since disposed of by Sparf v. United States, 156 U.S. 51 (1895). For example, does the minority suggest that notwithstanding Sparf a lawyer can argue to a jury that they are not bound by the judge's instructions of law, that they have a "dispensing function" and can acquit a man notwithstanding he is proven guilty of the offense charged if the jury feels, for some reason, any reason, even apart from the jury's view of the law, that he should not be called criminal or punished or sent to jail? Must trial judges so instruct the jury that they can ignore his instructions of law or even their own view of the law?

(4) Criminal procedural safeguards such as Rule 32(d), like due process and related concepts, are not ends in themselves, games created for the sake of the game. They are merely devices -- necessary devices -- to call into play to protect the innocent and those whom the presumption of innocence still attends.

In support of the views expressed by Judge Wright, it can be argued:

(1) We must have a constitutional regard for the least individual in society and to the extent that there is any possible reason why he should not be called criminal, we should, while there is still time, put the matter to a jury.

(2) Provided there has not been any substantial lapse of time and the evidence is still intact, to do so would not create any prejudice to the government, or society.

(3) The decision of the Supreme Court in Nagelberg v. United States, 377 U.S. 266 (1964) supports the conclusion that if there are mitigating circumstances the court has discretion under 32(d) to permit withdrawal of a guilty plea even though guilt is admitted.

(4) History supports the "dispensing function" of the jury to evaluate a defendant's personal as distinguished from his legal culpability and to acquit if, for reasons best known to the jury, they do not want to label the defendant criminal.

To this amicus neither history nor logic supports the dissenting view in Everett. The error would appear to lie in the emphasis upon the incidental results of our long developing jury system rather than upon its motivations. De facto, as Frank points out in the text cited by Judge Wright, juries can and effectively do acquit for a host of reasons known only to themselves and often without regard to the applicable law, so that

it might appear futile to engage in dialectics as to their not having the right to do so but only the naked power.

But how and why did this come about? In the crossroads decision in Sparf, the minority opinion, noting a host of historical precedents expressly or implicitly to the same effect, stated: "As said by Alexander Hamilton in People v. Croswell . . . the power of defining both law and fact upon the general issue in a criminal case is entrusted to the jury 'for reasons of a political and peculiar nature, for the security of life and liberty'" Sparf supra, 156 U.S. at 175. Farley and Howe, in their articles cited by Judge Wright, both demonstrate that the conception of the jury as ultimate judges of the law as well as the fact was a reflection of the historical struggle between the people and the state and the democratic distrust of judicial and executive tyranny.

This jury supremacy resulted from a popular political revulsion in England and the colonies to crown law enforced by crown judges; a revulsion which burned "Bloody" Jeffries into colonial legal minds and made heroes of the jury in the case of an obscure colonial printer. But this struggle for democratic expression never, as the articles noted established, conceived of a jury departure from all legal standards. The dissenting

opinion in Sparf stated:

"The duty of the jury, indeed, like any other duty imposed upon any officer or private person by the law of his country, must be governed by the law, and not by willfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be." 156 U.S. at 172.

Thus even the view, now long since abandoned, that the jury should be judges of both the law and the fact, acknowledged that the jury was still bound to follow the law, though for political reasons where popular beliefs collided with those of the crown or executive, the jury might see the law differently than as expounded by appointed judges. Colonial legal minds like John Adams and the colonial juror's oath required the jury to follow the law even though it be the law as conceived by the jurors. See Quincy Mass. reports, App. II, pp. 560, 564, 566. Even, therefore, under pre-Sparf conceptions of jury power, its "dispensing function," to the extent it was exercised beyond what the jury itself conceived to be the law, was an unavoidable by-product of democratic ascendancy over executive and judicial tyranny. On balance, to assure protection of individual liberties against crown or executive tyranny enforced through

appointed judges, our system early accepted, as an unavoidable risk that sometimes juries would free persons who, by any reasonable standard, should be convicted.

Judge Frank notwithstanding, there is some purpose then in speaking of power ~~is~~ right, not for purpose of a verbal exercise, but as a constant reminder that what we may accept as an unavoidable by-product of an otherwise commendable jury system is not to be taken as an asset or virtue of the system. Thus against the historical panorama of reason rather than result, we can see that while our system in fact enables a jury to exercise a "dispensing function," it is quite another thing to suggest that after conviction on a plea of guilty, we should, without other reason, open the case to a jury merely for the mischance that the jury exercise of the "dispensing function" will lead to an acquittal.

Accordingly, this amicus is more persuaded to the majority view in Everett than that of the minority, although our strong constitutional regard for the rights of the least individual, and our need for the strongest assurances that there be no conviction in the face of any doubts, may permit that unique circumstances warrant a trial court, in the exercise of its discretion, to grant the motion under Rule 32(d) even

through innocence is not claimed and guilt not denied. Perhaps this is the teaching of Nagelberg, although that case may be sui generis.

2. Is the Doctrine of Everett Altered By the Fact the 32(d) Motion is Made After Sentence?

Because of the absence of any informative legislative history as to the meaning of the phrase "to correct manifest injustice," we must turn to the cases to appreciate its scope. For a collection of cases see 4 Barron and Holtzoff, Federal Practice and Procedure, Wright Supp. at 277 (1964). We know, for example, that it does not comprehend a case where defense counsel allegedly failed to advise that the movant was ineligible for probation or parole. Smith v. United States, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), cert. denied 376 U.S. 957 (1964). Nor will relief be granted merely because defense counsel gave erroneous advice as to the maximum possible sentence. Georges v. United States, 262 F.2d 426 (5th Cir., 1959) aff'd. 288 F.2d 889 (1961). Similarly, it does not cover a situation where defense counsel erroneously advised defendant his plea would not subject him to deportation even though the statute was plain and defense counsel was a former Immigration Commissioner, United States v. Parrino, 212 F.2d 919 (2nd Cir., 1954), cert. denied 348 U.S. 840 (1954), although Judge Frank, dissenting, was shocked that in such circumstances opportunity for proof of innocence was denied.

In High v. United States, 110 U.S. App. D.C. 25, 288 F.2d 427 (1961), cert. denied 366 U.S. 923 (1961), manifest injustice was not found where the defendant, an educated and intelligent man who had pleaded guilty to one count of a two count indictment on the promise that the other count would be dismissed, was unexpectedly given a jail sentence by the trial judge. And in United States v. Baysden, 326 F.2d 629 (5th Cir., 1964), grounds for the motion were found lacking where the sentence received was more severe than that anticipated. But see Munich v. United States, 337 F.2d 356 (9th Cir., 1964), where the motion was granted because the plea may have been induced by the trial judge's indications of possible leniency. In Futterman v. United States, 91 U.S. App. D.C. 331, 202 F.2d 185 (1952), no manifest injustice was found in the alleged inducement of a plea by counsel's representations as to parole because they were clearly expressions of hope and not promise.

Edwards v. United States, 103 U.S. App. D.C. 152, 256 F.2d 707 (1958), cert. denied 358 U.S. 846 (1958), holds the rule unavailable merely on the claim of defense counsel's inadequacy, although the dissent would find manifest injustice in permitting a plea to stand where prior to advising it defense counsel had not exhausted inquiry as to all possible defenses. In Watts v. United

States, 107 U.S.App. D.C.367, 278 F.2d 247(1960), this Court found no manifest injustice in holding a defendant to his election to plead guilty rather than defending on the ground of illegal police procedures, particularly where his confession of guilt was repeated in a §2255 hearing.

Finally, there is Shelton v. United States, judg. below rev'd. 242 F.2d 101, on reh. judg. below aff'd 246 F.2d 571 (5th Cir., 1957), rev'd 356 U.S. 26 (1958). Appellant's brief heavily relies upon the original opinion in Shelton and the government responds thereto, without either brief noting that the original opinion was reversed en banc and, in turn, by reason of confession of error by the Solicitor General, reversed per curiam by the Supreme Court. What Shelton stands for is not clear. Factually, it appeared that a "deal" had been worked out between the defendant and the prosecutor whereby in return for a plea of guilty to one count of an indictment in the particular district, the Government would attempt to obtain dismissals of all other pending indictments against the defendant in other districts. The Government apparently conceded that such a deal had been made and it appeared that all other indictments, but one, had, in fact, been dismissed. In this context, the original majority opinion of the 5th Circuit held the 32(d) motion should have

been granted and, thereafter, when the case was heard en banc the court reversed. On certiorari, as indicated, the Solicitor General confessed error and the Supreme Court reversed, from which it might be implied that proof of the facts indicated, at least in the opinion of the Solicitor General of the United States, constitutes manifest injustice.

In none of the decisions noted is there anything to indicate that in pursuing or in the consideration of the 32(d) motion, the movant admitted his guilt of the offense charged.

From the decided cases, the following conclusions can be drawn:

1. The showing required to constitute "manifest injustice" is a far stronger showing than must be made to permit withdrawal of the plea before sentence;
2. Even patently erroneous advice by defense counsel, who should know better, as to the consequences, direct or collateral, of the guilty plea is not a basis for finding manifest injustice;
3. Mere disappointment as to expectations of a lesser sentence or of leniency, even if induced by counsel's advice and views, are insufficient; and
4. Profession of innocence, or at least an absence of continuing admission of guilt, is a prerequisite. See

particularly Everett v. United States, n. 17 and text, 336 F.2d at 984 and United States v. Hughes, 325 F.2d 729, 792 (2nd Cir., 1964), cert. denied 377 U.S. 907, reh. denied ___U.S.___ (1964).

The express requirement of 32(d) that after sentence the motion may be granted only "to correct manifest injustice" clearly indicates that the judicial officer to whom the motion is addressed must be fairly and objectively persuaded that there is some reasonable chance the defendant really is innocent of the crime charged or that there are legitimate legal defenses which might so persuade a reasonable jury or that, as in Nagelberg, there are unique circumstances by reason of which it would offend justice or decency to permit a conviction to stand. A suggestion that an acquittal might ensue by reason of the "dispensing function" of a jury irrationally exercised, or usurping judicial or executive clemency is not embraced, for if, as this amicus believes, the majority opinion in Everett is correct, under the facts of which the rule requires only a showing of any "fair and just" reason with respect to a pre-sentence motion, then, a fortiori, it would not be included where there must be a showing of "manifest injustice." Even the dissenting opinion in Everett indicates its reasoning might not apply after sentence (See n. 3 and text, 336 F.2d at 984), perhaps because to permit that reasoning to apply to a 32(d) motion

after sentence would give a defendant two bites at the apple, that is if he did not receive a sentence suiting his pleasure, he could then get a second chance by a mischance exercise of the jury's "dispensing function." "Justice is not a game; there is no constitutional right to 'throw dust in the juryman's eyes, or hoodwink a judge who is not overwise.'" United States v. Paglia, 190 F.2d 445 (2nd Cir., 1951).

C. Notwithstanding the Continuing Admission of Guilt, is the Application of Everett Altered by the Alleged Circumstances Leading up to Appellant's Plea of Guilty?

The character and scope of appellant's allegations about the conduct of his chosen counsel who represented him through the entry of his plea of guilty (See supra Statement of Facts and Argument - Introductory) are such that, if true, they are shocking. Without meaning to reflect upon their merit, for argument's sake only we will assume they are true. Thus, the situation is tantamount to a defendant being represented by a lawyer who, through incompetence or neglect, or by misleading his own client has, in effect, put his client in a worse position than if he had no lawyer at all.

We are, of course, cognizant that an accused's due process rights have been held to have been abridged where he was

not given the assistance of counsel at various critical stages in the trial court. See e.g. Gideon v. Wainwright, 372 U.S. 335 (1963) and Annotation 9 L.ed. 1260. See also Moore v. Michigan, 355 U.S. 155 (1957). This Court, in Dayton v. United States, 115 U.S. App. D.C. 341, 319 F.2d 742 (1963), cert. denied 375 U.S. 947 (1963), indicated that the absence of effective representation by counsel may be basis for relief from a sentence, but cautioned that "absence of effective representation by counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or prosecution to observe it and to correct it.", quoting its opinion in Diggs v. Welch, 80 U.S. App. D.C. 5, 8, 148 F.2d 667, 670 (1945), cert. denied 325 U.S. 889 (1945).

Even assuming, arguendo, that the failure of retained defense counsel to make little or no preparation to explore all avenues of defense and that his misleading his own client as to arrangements with respect to sentence might fall into the category of absence of effective representation and, in turn, be as bad as, or even worse, than the lack of representation where representation was required, nevertheless, the question remains whether the appellant's allegations in this regard must be resolved here or by rehearing below on his 32(d) motion where appellant continues his admission of guilt.

For reasons similar to those expressed in the decision in Watts v. United States, supra, it is the opinion of this amicus that any alleged improprieties in the processes leading to the entry of his plea of guilty in the court below have now, in effect, been waived by the "ratification" of his guilt subsequently and particularly in his pro se brief here. In the writer's opinion, that continuing confession of guilt renders moot any question as to whether the original guilty plea was falsely induced or brought about by the ineffective assistance of counsel. Put another way, in the context of Rule 32(d) itself, there would appear to be no possible basis for asserting that manifest injustice would result by holding a defendant to a plea of guilty, allegedly falsely or improperly induced, when the confession of guilt is renewed while pursuing a 32(d) motion. To deny relief in such circumstances does not in any way shock the conscience of this amicus or suggest any potential injustice. To do otherwise would be to permit convicted defendants to engage in a game for the sake of the game itself on the erroneous premise of the dissent in Everett that juries have a "dispensing function" notwithstanding the law and the facts require a finding of guilt.

II.

EVEN ASSUMING APPELLANT WAS DENIED A FAIR
HEARING ON HIS 32(d) MOTION, IS THERE ANY
REASON TO REVERSE FOR A NEW HEARING?

Even read most favorably to the judge presiding below, the hearing granted appellant was so unfair as to be no hearing at all but merely a protagonist's implementation of a preconceived judgment. Starting from his initial handwritten inscription on the first page margin of appellant's petition concluding that appellant's allegations were "incredible" the trial judge proceeded to prove that conclusion. In his conduct of the hearing -- by the limitations placed upon appellant's counsel, as for example limiting any exploration of the circumstances leading up to the guilty plea, but permitting opposition testimony on the premise that the integrity and reputation of defense counsel was at stake; by an aggressive and undisguised hostility towards appellant and his contentions which even the cold record cannot conceal, and; by his characterizations of the witnesses before him and what they had to say -- the trial judge carefully marshalled the entire proceeding merely to support his expressed preconceived judgment. While a trial judge is in an understandably difficult position in a case such as this, taking evidence upon and evaluating charges resting upon alleged incompetency and

misconduct involving a member of the bar, nevertheless, a fair hearing of such charges requires open inquiry and objectivity rather than, as was evident in the conduct and the remarks of the trial judge below, merely an effort to vindicate counsel (see e.g. Tr. 5,6).

Because the nature of the charges made by appellant raises a critical issue as to the integrity of judicial administration and public confidence therein, and because of the brevity of the transcript below, it is assumed the Court will read the entire transcript and thus draw its own conclusions as to the fairness of the 32(d) hearing.

But even assuming that the hearing so given appellant below was not a fair one, which bespeaks need for administrative corrective measures, the question still remains whether a reversal

7/ Although this amicus has a two-generation ingrained respect and attachment for our judicial process and the judiciary who carry its heaviest burdens, as well as personal affection for the trial judge whom he has personally known for more than 25 years, nevertheless, as amicus, he is reluctantly but firmly constrained to suggest that this, and other cases like it, demonstrate: (a) that there is considerable room for improvement in judicial conduct at the trial court level so as to secure adequate and fair results and to create public confidence in our system; (b) that the real problem, the judicial misconduct evidenced below, cannot be reached or cured by any decision in this case nor on a case by case basis; (c) that existing methods to correct judicial abuses such as evidenced below, i.e., the critical Appellate opinion, death and impeachment, are wholly inadequate to the problem, the first having proven to be ineffective, the second not desired and the third historically established to be theoretical, but not real; and (d) that corrective measures for such judicial misconduct might best follow from study and recommendations by the Bench itself, possibly through the medium of the Judicial Conference.

is indicated or required.

The issue posed for this Court on this appeal is not whether the trial judge abused his discretion in failing to fairly inquire into the appellant's allegations below. Rather the question is whether even if so the case is now in such a posture as to permit the exercise of discretion to set aside the conviction and to permit the withdrawal of the plea of guilty. For reasons already advanced, absent other compelling circumstances, it is believed that the continuing confession of guilt renders moot any question as to whether the guilty plea was first induced or brought about by improper circumstances or the inadequacy of counsel. Compare Watts v. United States, supra.

The only possible basis for reversal because of the unfairness of the 32(d) hearing below -- which this amicus cannot recommend -- is that under this Court's order of June 11, 1964, the record was remanded to the court below with directions to hold a 32(d) hearing and that this mandate has not been complied with in that the unfair hearing given was in effect no hearing at all. But since, for the reasons indicated, no hearing, fair or unfair, could, in this amicus' view find reason or basis for concluding that manifest injustice would ensue: were the conviction not set aside and leave not

granted to withdraw the guilty plea. It would appear that any further hearings would serve no useful purpose.

III.

PROPER JUDICIAL ADMINISTRATION
COULD SUBSTANTIALLY AVOID THE
ISSUE RAISED HERE; THE URGENCY
OF PROPER ADMINISTRATION BY THE
TRIAL COURTS IS HIGHLIGHTED BY
THE FACT THAT THE TYPE OF ISSUE
RAISED HERE IS DIFFICULT TO RE-
SOLVE BY ANY LATER HEARING

As the majority noted in Everett, 336 F.2d at 980-981, n. 3, the judges of the court below, in 1959, promulgated a resolution that a series of facts should clearly be established by the trial judge at the time of taking a plea of guilty to assure its being completely voluntary and informed. Apparently, most of the judges below in substance follow the dictates of that resolution. But some believe, like the trial judge here said, "I don't ask those foolish questions. I don't go through that foolish ritual", (Tr. 17).

Certainly substance is not served by ritual. But the impelling desirability and purpose of the substance of the 1959 resolution remains, and the need thereof is highlighted by this case. Apart from the requirements of Rule 11, F.R.Crim.P. fairness and proper judicial administration require

that when taking a guilty plea, the trial judge be absolutely assured that the plea is entered on an intelligent and an informed basis, free from duress or promise. To do less opens the plea to challenge and doubt.

In a case such as this, where the later grounds for setting aside the plea relate to the relations and conversations between the defendant and his own counsel, it is dubious whether any hearing can fairly reach the truth of the matters in issue. While the trial judge in this case, in no uncertain terms articulated the compulsions upon him to resolve credibility against an accused charged with a heinous crime in favor of a member of the bar, human experience indicates that other judges, on such an issue of credibility, might well feel the same way, even if they did not so express themselves. Such a battle of credibility, the resolution of which, by reason of the background of the two contenders, is necessarily weighted against the accused should be avoided. Full and informative interrogation by the bench at the time a guilty plea is taken would minimize the risk that that plea was not made voluntarily and on a completely informed basis, free from any duress or promise that might otherwise taint it.

Accordingly, in the exercise of its supervisory jurisdiction, this Court may well choose to require the bench below to adhere to the substance of its own resolution. It is possible, of course, that as in the Mallory cases, this Court could conclude that the only method of enforcing the attendant necessities is to order a reversal here. However, that drastic remedy would appear unnecessary in the relationships between an appellate and a trial bench, although it may be otherwise in the relations between the judiciary and the police.

CONCLUSION

For the indicated reasons, while the amicus is of the view that appellant was not granted a fair hearing below on his 32(d) motion and that his contentions as to the inadequacy of his representation raise some question concerning his plea of guilty, nevertheless, in the absence of any other

8/ Mallory v. United States, 354 U.S. 449 (1954). Pertinent to the instant case, however, is Goldsmith v. United States, 107 U.S. App. D.C. 305, 277 F.2d 335, cert. denied 364 U.S. 863 (1960), where a later valid confession was held admissible notwithstanding an earlier confession obtained during a period of illegal detention which might otherwise have required reversal under the Mallory rule.

compelling circumstances, his repeated confession of guilt here should foreclose any relief under 32(d) and, therefore, precludes reversal.

Respectfully submitted,

SHELDON E. BERNSTEIN
Amicus Curiae

APPENDIX "A"

COLLOQUY ON FEBRUARY 6, 1964
WHEN GUILTY PLEA ENTERED

MR. LAUGHLIN: Your Honor, in this case the defendant desires to withdraw his plea of not guilty and enter a plea of guilty. I want to say to Your Honor that I have conferred with him a number of times. He fully understands the situation. I have gone over it with him. I have talked to other people. And in view of all the circumstances he wants now to admit his guilt and so state to Your Honor and the interrogation will show Your Honor it is entirely voluntary on his part.

THE COURT: You have apprised the defendant of his rights, of course?

MR. LAUGHLIN: Yes, Your Honor, very carefully.

THE COURT: Melvin Burton Bishop, you have heard your Counsel's statement, have you not?

DEFENDANT BISHOP: Yes, I have, sir.

THE COURT: Your counsel states that you desire to plead guilty to the indictment, is that correct?

DEFENDANT BISHOP: Yes, sir.

THE COURT: You understand, of course, that you don't have to plead guilty, you are entitled to be tried by a jury; you understand that?

DEFENDANT BISHOP: Yes, Your Honor, I do.

THE COURT: But you also must understand that if you plead guilty that is final, you can't afterwards change your mind; you understand that?

DEFENDANT BISHOP: Yes, sir, I do.

THE COURT: Now the charge against you is that you assaulted Marsha L. Cox with a caustic acid. Did you do this?

DEFENDANT BISHOP: Yes, sir.

THE COURT: Very well, the Court will accept the plea.

THE DEPUTY CLERK: Melvin Burton Bishop, in Criminal Case No. 1077-63 in which you are charged with assault with a dangerous weapon, do you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty?

DEFENDANT BISHOP: Yes, I do.

APPENDIX "B"

COLLOQUY ON APRIL 7, 1964
THE TIME OF SENTENCE

MR. LAUGHLIN: Your Honor, this is perhaps one of the most difficult and probably one of the saddest cases that I have ever had. Your Honor knows me well enough in any case if I see any element of a defense I will utilize it to the utmost. In this case, after I talked to Mr. Bishop, I just couldn't see any element of defense. Now, Your Honor, he did not put the government to the expense of a trial. He came in and he entered a plea of guilty. It was a case that he was undoubtedly deeply in love with this woman and then she turned her affections to someone else. In other words, she made up her mind that she didn't want to marry him, that she wanted to marry someone else. I think at the time he just lost control of his emotions, and I think he has exhibited genuine sorrow for this, and he has indicated to me, and perhaps it is in the report, Your Honor, that he is willing to assist her. It was a rather severe injury, Your Honor. He is willing to assist her financially with her hospital ---

THE COURT: In the report he takes a rather lukewarm attitude. He is reluctantly willing to assist financially, but

when he was asked -- according to the report there seems to be some doubt about his attitude in the matter.

MR. LAUGHLIN: In other words, as I understood -- of course, I don't know what is in the report, Your Honor. I understood that he did in the beginning and even had notified her, because I think her medical and hospital bills have been quite considerable. Now he is regularly employed, Your Honor, by the United States Government, and I understand has never been in any prior difficulty, and I believe that the ends of justice would be served, Your Honor, if Your Honor would put him on probation with the condition that he does regularly contribute to her hospital and medical bills.

THE COURT: Melvin B. Bishop, is there anything you would like to say before sentence is imposed?

THE DEFENDANT: Your Honor, I would just like to say that I didn't intend to convey that I was lukewarm about helping out. That's all.

THE COURT: This defendant threw sulphuric acid over the face of the woman who was the victim of this crime. There had been a relationship between him and the victim, but this was a premeditated crime because he acquired sulphuric acid and he carried it around. It was not a crime of passion in the sense

in which we use that term, something done on the spur of the moment like a man who catches his wife in the arms of another man. It was a horrible crime. I do not see how a civilized person could do that to another human being. Now the victim of this offense was in the hospital for about seven weeks. There is a long letter from her mother to the effect that this lady is going to need a surgical operation on her eye in order to save the eyesight of one of her eyes, and also that she will need plastic surgery. Now this is something that is hardly pardonable, a crime of this sort. It is a savage thing to do. This defendant is a man of intellectual attainments. He is a mathematician. He occupies a responsible position that only a highly educated man can fulfill, but apparently his moral advance has not been equal to his intellectual advance. The family, especially the mother of this lady, feels very strongly that there ought to be punishment here, and I think there would be a feeling that there was a gross miscarriage of justice so far as the family is concerned if there was probation, and I do not think this is a probation case. I think this is a very horrible crime. Now the maximum that can be imposed is ten years. The Court is going to take into consideration the fact that the defendant pleaded guilty and therefore is going to

impose a considerably lesser sentence than it would have imposed otherwise. If the defendant had stood trial and been convicted, the Court would have been inclined to impose the maximum penalty because of the ghastly effects that an attack such as this has on the victim of the crime.

Melvin B. Bishop, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than two years and four months and not more than seven years.

